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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Concluding observations on the second periodic report of Kenya

Addendum

Information received from Kenya on follow-up to the concluding observations*

[Date received: 22 August 2014]

Follow-up information relating to paragraph 9 (a) of the concluding observations (CAT/C/KEN/CO/2 and Corr.1)

1. The Independent Policing Oversight Authority (IPOA) was established by the Independent Policing Oversight Authority Act no. 35 of 2011, to provide for civilian oversight over the work of the police in Kenya. The Authority is mandated to conduct impartial and independent investigations, inspections, audits and monitoring of the National Police Service to prevent impunity and enhance professionalism in the interest of the public. The Authority considers complaints about police misconduct or neglect of duty, or police practices, policies and procedures, both from the public, the DPP and the internal affairs department of the national police service.

2. No changes have been made to the IPOA's mandate to vary, in any way, its mandate to investigate and report complaints against the police. Indeed, the Authority has prepared draft regulations to help enhance police accountability and improve police-community relations. The regulations propose tough measures for officers who do not secure evidence and preserve scenes in cases of deaths or serious injuries occurring in custody or during police operations. Police officers who fail to report deaths or serious injuries that occur to persons in custody or as a result of police action risk disciplinary or criminal proceedings when the raft of regulations is gazetted. The IPOA will conduct investigations to establish if there was negligence in the performance of duty by a member of the National Police Service in which disciplinary action will be recommended. Preliminary investigation must be undertaken within 15 days, while a full investigation is expected to take four months to be completed. In case the investigation discloses a criminal act by a police officer, the

* The present document is being issued without formal editing.

Authority may recommend prosecution by the Director of Public Prosecutions; in the event that the probe finds shortcomings in the process or procedures of the police service, recommendations for improvements will be put forward. Illegitimate use of excessive force by any police officer will also be investigated to ascertain responsibility, which may lead to disciplinary or criminal charges.

3. The draft regulations also recommend a much more simplified process of recording complaints against the police, which can be done orally or in writing by any individual. The objective is to establish the facts, aiming to prevent misconduct from happening again, provide remedy and support the police in enhancing professionalism and build greater public confidence. Cases of gross misconduct, deaths and serious injuries will be investigated by IPOA while other complaints can be investigated by the Internal Affairs Unit of the Police but taken over by IPOA if there is inordinate delay in the investigation.

Follow-up information relating to paragraph 9 (b) of the concluding observations

4. The National Police Service was established by the National Police Service Act No. 11 of 2011. One of the major functions of the Service, outlined in Article 244 (d) of the Constitution of Kenya, is to train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and the dignity of the human person. The police are required, at all times, to comply with constitutional and international standards of human rights and fundamental freedoms in the performance of their duties. The Government is committed to ensuring that new recruits to the National Police Service are equipped with the knowledge and skills of proper and acceptable policing. Serving police officers are obliged to continually attend relevant courses to maintain, develop or increase knowledge and skills, and to keep abreast of new and emerging issues related to their professional lives. To this end a new police training curriculum was developed following the recommendations of the National Taskforce on Police Reforms, established on 8 May 2009, to recommend comprehensive reforms that would enhance effectiveness, professionalism and accountability in the police services.

5. The curriculum was developed under the auspices of the Police Reforms Implementation Committee (PRIC) and the Kenya Institute of Education (KIE). All candidates recruited to join the Kenya Police and Administration Police must undergo an intensive training for 15 months, including three months of internship, in line with the new training curriculum. The curriculum has been designed to include lessons on the proper use of force and firearms, in compliance with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

6. All law enforcement officers are trained on the respect of human rights that enable fair, just and humane treatment of the public, which is critical in policing, especially in regard to duties involving arrest, detention, search, seizure of property, surveillance, use of force and firearms. Serving police officers are required to undertake periodic review courses on the use of firearms.

7. All police officers are required to study and gain a deep understanding of the Police Standing Orders and ensure that they are effectively implemented. The standing orders were developed to provide all sworn National Police Service officers with guidelines for the proper use of force and firearms and non-deadly force and to provide the officers with guidelines for the safe use and deployment of Service-authorized firearms. The standing orders stipulate that a police officer shall always attempt to use non-violent means first and that force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result. Where deadly force is not authorized, officers may use only that level of force that is objectively reasonable to bring an incident under control. On the restrictions on the use of firearms, the Orders are clear that firearms may only be used when less extreme means are inadequate and for the following purposes:

(a) Saving or protecting the life of the officer or other person;

(b) In self-defense or in defense of other person against imminent threat of life or serious injury.

(c) A police officer shall make every effort to avoid the use of firearms, especially against children. Police officers are authorized to use Service-approved, non-deadly force techniques and issued equipment:

i. To protect themselves or another from physical harm;

ii. To restrain or subdue a resistant individual;

iii. To bring an unlawful situation safely and effectively under control.

8. All police officers who use any form of force are required to immediately report to the officers' superior explaining the circumstances that necessitated the use of force, and the supervisor is expected to judge the rightfulness and decide on the next step subject to the regulations. Any use of force that leads to death, serious injury other grave consequences must be reported immediately by the Officer-in-Charge, or another direct superior of the person who caused the death or injury, to the Independent Police Oversight Authority (IPOA) who shall investigate the case. Persons affected by the use of force and firearms or their legal representatives can lodge a complaint with IPOA.

Follow-up information relating to paragraph 9 (c) of the concluding observations

9. The collection of data to adequately respond to this concluding observation is ongoing and will be submitted as soon as it becomes available.

Follow-up information relating to paragraph 10 of the concluding observations

10. The Constitution of Kenya safeguards the fundamental rights and freedoms for persons who have been deprived of liberty, subject only to the limitations permitted. A person deprived of liberty must be treated, in a humane manner and with respect for inherent human dignity. A major element of this right is found in Article 49 (1) (c), which allows an arrested person the right to communicate with an advocate and other persons whose assistance is necessary. Every effort is made, by the police, to ensure that all persons who have been deprived of liberty are provided with crucial access to an advocate, family member or medical personnel as soon as possible. The great geographical distances, lack of communication, limited infrastructural facilities and even the low number of personnel, whether medical or legal, in some areas in Kenya may in a few cases constrain this right. Reform measures are being undertaken in various institutions to enhance: access to justice in some far-flung areas of Kenya, the number of medical personnel and also to ensure that better communication and infrastructural lines are opened countrywide.

11. The Persons Deprived of Liberty Bill 2014 was tabled before the National Assembly on 25 July 2014. This is one of the constitutional time-bound pieces of legislation that must become law before the end of August 2014. The purpose of the Bill is to give effect to constitutional provisions on the rights of those detained, held in custody or imprisoned. Section 7 (1) (g) of the Bill stipulates that, subject to certain limitation, as espoused in the constitution, any person arrested and held in lawful custody in relation to any criminal proceedings is entitled to due process, including the right to communicate with their family or other person of one's choice. Such person also has a right to communicate privately with advocates. Prisoners will also have the right to be visited by their family during designated family days.

Follow-up information relating to paragraph 17 of the concluding observations

12. In Kenya belief in witchcraft is strong and widespread in some communities. Elderly people, especially women and those who are poor and physically vulnerable are often accused of witchcraft in some regions in Kenya. The lynching of those suspected of practicing witchcraft is a vice that the Government is grappling with. Efforts are being made to educate the citizens that the lynching of suspected witches is wrong and not justified in any way. Anyone found to be involved in this heinous act is arrested or indicted for assault, causing grievous bodily harm, murder or arson, all crimes addressed under Kenya's Penal Code. The Witchcraft Act, 1925, under section 6, stipulates that a person who accuses or threatens to accuse any person with being a witch or with practicing witchcraft shall be guilty of an offence and liable to a fine not exceeding Sh500,000 or to imprisonment for a term not exceeding five years.

13. Consultations have begun among key stakeholders in the country with a view to reviewing the 1925 Witchcraft Act and bringing its provisions in line with Constitutional and international safeguards. While lynching is illegal and punishable under the Penal Code, sustaining a prosecution on the practice of witchcraft in court is problematic. Witnesses often refuse to give evidence to police or stand as witnesses in court.

14. County governments, in regions where this practice is rampant, have prioritized civic education as a way of breaking the chains of superstition that bind many. Various awareness campaigns being undertaken in affected areas against witch hunting and related murder and abuses have contributed towards minimizing the practice to some degree.

Follow-up information relating to paragraph 18 (a) and (c) of the concluding observations

15. The Multi Agency Taskforce on the Post Election Violence cases was established by the Director of Public Prosecutions on 9 February 2012. The taskforce was mandated to assess the progress of current investigations into the post-election violence, and to decide whether there is enough evidence to pursue 5,000 cases files that had been opened. The task force has so far prepared interim reports in relation to the files that have been reviewed. Information on the status of the files was shared with the Committee during the presentation of Kenya's second periodic report on 15 and 16 May 2013. The Taskforce is currently in the process of reviewing the remaining files with a view to preparing a conclusive report for purposes of informing, keeping data and most importantly advising the Government on the 2008 post-election violence-related matters so as to bring all perpetrators to book and to avoid future atrocities. The report will facilitate prosecution and other alternative dispute resolution mechanisms which include reconciliation, mediation, arbitration and other traditional dispute resolution strategies.

Follow-up information relating to paragraph 18 (b) of the concluding observations

16. The Kenyan government submits that it has fully provided cooperation, support and assistance to the International Criminal Court (ICC) in accordance with the Rome Statute and the fundamental legal principles of general application that are operative in the Republic of Kenya. This full cooperation with, support and assistance to the Court, including the Office of the Prosecutor (OTP), continues to this day. Indeed, the Kenyan Government established an ICC Cooperation Committee whose primary responsibility is to ensure that all matters pertaining to cooperation between the Kenyan Government and the ICC are properly and promptly addressed. The Kenyan Government has additionally provided, as indicated below, the following assistance and cooperation to the Court and the Prosecution:

(a) The entering into force of a host country agreement with the Court;

(b) The formation of a multi-agency task force on post-election violence, whose mandate included, inter alia, reviewing, reevaluating and reexamining all post-election violence pending investigation or pending trial and concluded cases;

(c) Settlement of internally displaced persons: the Kenyan Government has taken measures to settle persons displaced during the 2008 post-election clashes in the country. These measures include the purchase of land for resettlement of the IDPs, construction of houses for the IDPs, offering of counseling services, cash transfers, access to free medical attention for some IDPs in Government facilities and periodic food distribution to victims;

(d) Establishment of an independent Kenyan Witness Protection Agency;

(e) The Reports of the Commission of Inquiry into Post Election Violence (CIPEV), the Kenya National Commission of Human Rights (KNCHR) and other confidential Government documents were provided to the prosecution without redactions or limitation for its use in judicial proceedings. The reports and materials generated by the CIPEV and KNCHR formed the bulk of the materials relied upon by the prosecution in its application to initiate an investigation in Kenya, in the OTP's applications for summonses to appear in the two Kenya cases, and during the hearings on the confirmation of charges. Without these materials, it would have been difficult, if not impossible, for the OTP to provide sufficient evidence to meet the relevant threshold of proof set for the respective stages of the proceedings;

(f) The Kenyan Government has further enacted several pieces of legislation that complement its cooperation with the Court. These include the Witness Protection Act, the Prevention of Organized Crimes Act, the Prevention of Terrorism Act, the Mutual Legal Assistance Act and the Proceeds of Crime and Anti-Money Laundering Act.

Follow-up information relating to paragraph 18 (d) of the concluding observations

17. The Truth, Justice and Reconciliation Commission (TJRC) was established by an Act of Parliament in 2008 to investigate serious human rights violations and other injustices dating from December 1963 to February 2008. The Commission conducted countrywide investigations and prepared a final report setting out comprehensive recommendations. The final report was published in the Government's *Kenya Gazette* on 7 June 2013.

18. In December 2013, the National Assembly debated and passed an amendment to the Truth, Justice and Reconciliation Commission Act. This is due to the fact that the Act was enacted in 2008 and the Commission was supposed to have finished its work within two years in order to inform the Constitution-making process. The Commission presented its report more than two years after Kenyans had adopted a new Constitution. There was therefore the need to provide for the role of Parliament as provided for in the Constitution on such matters of national importance. Some of the key recommendations also require Government policies and other laws to implement, hence the need to bring Parliament on board.

19. The TJR Act was amended to make provisions for the consideration of the report of the Commission by the National Assembly. The amendments took effect on 28 June 2013. The amendment makes definitional changes to section 2, essentially including the Attorney-General as "Minister", considering that there is no longer a Minister for Justice as envisaged in the old Act. The amendments were also aimed at altering sections 48, 49 and 50, making provision for consideration of the TJRC report by Parliament, while granting the Attorney-General authority to set in motion a mechanism to monitor its implementation according to the recommendations of the National Assembly.

20. The National Assembly Legal Affairs Committee considered the report and submitted it to the National Assembly for consideration. The report is currently before the

National Assembly and as soon as it has been considered and released, the Amendment act recommends that the implementation commence immediately.

21. It should be noted that most of the recommendations of the Commission are already being implemented, especially those that touch on the Constitutional Commissions, namely those that concern:

- Judicial reforms
- Police reforms
- Mandate of the National Land Commission
- The article 59 national Human Rights Institutions and their mandate to inquire into human rights violations
- Resettlement and compensation of IDPs
- The steps towards establishing a legal service nationwide
- An assessment and review of over 6,000 PEV files by the ODPP to determine the way forward and closure on non-prosecutable cases.